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Supreme Court of the United States

OCTOBER TERM, 1944.

No. 1190.

SOCIETE INTERNATIONALE FORESTIERE ET MINIERE DU CONGO and COMPANHIA DE DIAMANTES DE ANGOLA,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF OF PETITIONERS.

JOHN M. HARLAN,
JOHN E. F. WOOD,
Counsel for Petitioners.

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I.

Issuance of the Writ of Certiorari under Judicial Code, Section 262, is not limited to cases involving jurisdiction or questions of public importance.

As we read the Government's brief, the power of the Court to issue the writ is not questioned. The suggestion, however, that this power should be used only in cases where the lower court has exceeded its jurisdiction, or in cases affecting major governmental policy, would have the effect of artificially curtailing the appellate powers which this Court has exercised and which Congress clearly intended to be exercised under the statute.

Ex Parte Peru, 318 U. S. 578, involved no question of jurisdiction (318 U. S. 587) and although issuance of the writ of prohibition in that case was based upon the ground that the dignity and rights of a friendly sovereign state were involved, the Court quoted with approval the statement in *Ex Parte United States*, 287 U. S. 241, 248-49, that the power to issue writs under Judicial Code Section 262, would be exercised both where a question of public importance is involved, and "where the question is of such a nature that it is peculiarly appropriate that such action by this Court should be taken."

The issuance of such writs is a matter resting in the sound discretion of the Court, and where, as here, ordinary appellate procedure is inadequate, and review by this method "is reasonably necessary in the interest of justice" the issuance of the writ is appropriate. *Adams* v. *U. S. ex rel. McCann*, 317 U. S. 269, 274.

Section 262, in authorizing the issuance of "all writs," includes certiorari as well as prohibition and mandamus. The writ of certiorari was never necessary to correct excesses of jurisdiction, which could be accomplished by a writ of prohibition, or to compel the performance of ministerial acts which could be required by the writ of mandamus. Certiorari was designed to perform a broader supervisory function "to the end that the party may have the more sure and speedy justice * * *" (Bacon, *Abridgement of the Law*, Vol. 2, p. 162).

II.

The order of the District Court cannot be justified as a means of protecting the jurisdiction of the Court.

The respondent refers to the power of a District Court to issue preliminary injunctions against the maintenance of actions in other courts, in certain circumstances, "to protect and preserve its jurisdiction," citing *Looney* v. *Eastern Texas R. R. Co.*, 247 U. S. 214, and *Klein* v. *Burke*

Construction Co., 260 U. S. 228. Such cases present no analogy to the one now before the Court because the order in this case has no relation to the jurisdiction of the Court to hear and determine the issues submitted to it. Jurisdiction over the person of the corporate defendants has been questioned but this issue will be determined by the District Court in accordance with prescribed procedure, as will all other questions arising in the case.

The desire to have assets available at some future date out of which fines for contempt of court may be collected has nothing to do with the preservation of the jurisdiction of the Court. No matter what form of words is contrived to describe the order entered in the District Court, it remains in substance and in fact an order for the requirement of security for the performance of a possible future decree, and is governed by Rule 64 of the Rules of Civil Procedure. As we have shown in our main brief, an injunction against the transfer of assets in order to accomplish this purpose has never been countenanced.

The case of *Zenith Carbureter Co.* v. *Stromberg Motor Devices Co.*, 270 Fed. 421 (C. C. A. 7th), which is relied upon by the respondent, does not support its position. In that case, after a decree had been entered establishing the liability of the defendant to the plaintiff, and referring the matter to a master for an accounting as to the precise amount of the liability, an injunction was entered against the disposition of a fund which it was contended was impressed with a trust in favor of the plaintiff. This was, therefore, the familiar case of a court preventing dissipation of a fund which was the subject-matter of the action and in which the plaintiff claimed an interest. In a later case before the same court, an injunction against the transfer of assets as a means of providing security for the performance of a decree—even after the establishment of liability—was denied and the *Zenith* case was distinguished on that ground. *Wahlgren* v. *Bausch & Lomb Optical Co.*, 77 F. (2d) 121, 123 (C. C. A. 7th).

III.

The order of the District Court is not justified by either the injunction statutes of New York or the claimed analogy to the writ of ne exeat.

The respondent replies upon Sections 877-878 of the New York Civil Practice Act, which define the cases in which an injunction may be entered. These sections, which are set out in full in the Appendix to this reply brief, do not support the order, and on the contrary show that the injunctive power of a Court of Equity is limited to orders protecting some alleged existing *right* of the plaintiff.

Section 877 provides for the normal case in which the plaintiff sues for an injunction against the commission or continuance of an act and seeks a preliminary injunction against the commission or continuance of that act during the pendency of the suit.

Section 878 authorizes the issuance of an injunction against "an act in violation of the plaintiff's rights respecting the subject of the action and tending to render the judgment ineffectual." It further provides for an injunction against the removal or disposition of assets "where it appears that the defendant during the pendency of the action threatens or is about to remove or dispose of his property with intent to defraud the plaintiff . . . ."

These sections have been authoritatively construed by the courts of New York as permitting injunctions only against acts which invade some alleged right of the plaintiff. In *Campbell v. Ernest*, 64 Hun. 188, an injunction was obtained against transfer of the defendant's assets, in order to secure payment of the judgment which the plaintiff ultimately sought. Upon appeal the injunction order was reversed and it was held that injunction would not lie for such a purpose. After quoting the statues which now are contained in Sections 877 and 878 of the Civil Practice Act, the court said (64 Hun. 191):

"It was the design of the law to empower the Court to enjoin the commission of some particular act which the defendant was doing or procuring, or suffering or threatening, in violation of the rights of the plaintiff respecting the subject of the action, or where he was about to remove or dispose of his property with intent to defraud the plaintiff. But it never was intended to authorize the restraint of all sales of property.

"Moreover, before any act can be restrained, it must be violative of the rights of the plaintiff respecting the subject of the action, and we may pause here to say that the property of the defendant is not the subject of this action, and no act of the defendant in relation thereto can violate any rights of the plaintiff respecting the same for that reason, and for the additional reason that the plaintiff has no rights in such property, and claims none.

"In short, this statute has no application to an action of this character where a moneyed judgment only is sought. It was designed to provide a short and easy method for the procurement of injunctions in equitable actions for relief where the defendant, if unrestrained, would do or suffer some act in violation of the rights of the plaintiff respecting the subject of the action, which would tend to render the judgment ineffectual and nugatory. *But plainly it applies, and can be utilized only in an action involving the rights of the parties to something which constitutes the subject of the action in respect to which the plaintiff claims some rights and seeks some special relief.*" (Italics added)

The statutes were similarly construed in *Platt* v. *Elias*, 101 N. Y. App. Div. 518, where it was held that the court was not authorized to issue an injunction against transfer of the defendant's assets as security for performance of a decree to be entered in the suit. After pointing out that there was no showing, among other things, that the plaintiff would be entitled to recover any specific property in the possession of the defendant, the court said:

"* * * As I view it, the plaintiff is no more entitled to an injunction in this action than in any case

where a cause of action is alleged against a defendant and the plaintiff then seeks to sequestrate all of the defendant's property so that it may be held to apply to any judgment which he may obtain against the defendant."

The cases cited in the respondent's brief are in accord with these principles. *Bronx County Trust Company* v. *O'Connor*, 220 N. Y. App. Div. 340 was an action to impress a trust on certain funds, and the preliminary injunction restrained disposition of the trust fund which the plaintiff claimed. *Maine Products Company* v. *Alexander*, 115 N. Y. App. Div. 112 was a suit to rescind a sale of corporate stock and the injunction against transfer of that stock *pendente lite* was one relating to the specific subject matter of the suit. Similarly, in *Smith* v. *Bradlee*, 37 N. Y. Supp. 512, an injunction was issued against disposing of the assets of a corporation out of which allowances were being sought by counsel in a stockholders' derivative action, the right to such allowances being predicated on Section 61a of the General Corporation Law.

The analogy which the respondent seeks to draw between this order and the writ of *ne exeat regno*—long since a legal curiosity—is too far-fetched to require discussion. The order is not and does not purport to be a *ne exeat*, but is simply a requirement that the petitioners not use or dispose of their property. The Federal statute (Judicial Code, § 261) which preserves the writ in appropriate cases does not extend its scope so as to permit such an order. In New York the writ has been abolished in its entirety. (*N. Y. Civil Rights Law*, § 23). The respondent cannot escape the necessity of justifying the order below under the provisions of Rule 64. This, for the reasons already set forth, it has utterly failed to do.

Respectfully submitted,

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Counsel for Petitioners.

APPENDIX.

Sections 877 and 878 of the New York Civil Practice Act.

§ 877. *Injunction, when the right thereto depends upon the nature of the action.* Where it appears from the complaint that the plaintiff demands and is entitled to a judgment against the defendant restraining the commission or continuance of an act, the commission or continuance of which during the pendency of the action would produce injury to the plaintiff, an injunction order may be granted to restrain it. The case provided for in this section is described in this act as a case where the right to an injunction depends upon the nature of the action.

§ 878. *Injunction, when the right thereto depends upon extrinsic facts.* In either of the following cases an injunction order may also be granted in an action:

1. Where it appears that the defendant, during the pendency of the action, is doing or procuring or suffering to be done, or threatens, or is about to do, or to procure or suffer to be done, an act in violation of the plaintiff's rights respecting the subject of the action and tending to render the judgment ineffectual, an injunction order may be granted to restrain him therefrom.

2. Where it appears that the defendant during the pendency of the action threatens or is about to remove or to dispose of his property, with intent to defraud the plaintiff, an injunction order may be granted to restrain the removal or disposition.